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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of DEREK J. STAFFORD and MICHELE R. STAFFORD.	
DEREK J. STAFFORD, Appellant, v. MICHELE R. STAFFORD, Respondent.	A133579, A133984 (San Mateo County Super. Ct. No. F095105)

This is the consolidated appeal of two distinct trial court orders in post-judgment marital dissolution proceedings involving appellant Derek Stafford and respondent Michele Stafford.[1] Derek first challenges a court order imposing upon him $30,000 in sanctions based upon a finding that his conduct during these proceedings had frustrated settlement and generated unnecessary legal expenses for Michele. (Fam. Code, § 271.) Second, Derek challenges an order denying his motion to modify child support to remove a requirement that he pay approximately $10,000 per year to cover his equal share of the children's private school tuition. (Fam. Code, § 4062.) We affirm.

[1] As is customary in marital dissolution proceedings, we refer to the parties by their first names, intending no disrespect.

FACTUAL AND PROCEDURAL BACKGROUND

On August 14, 2008, a stipulated judgment was entered to dissolve the 11-year marriage of Michele and Derek, which had yielded two children, Alex (born in 1999) and Max (born in 2002). Since that time, the parties have engaged in lengthy and often contentious post-judgment proceedings to address issues involving, among other things, visitation, child support and child health therapy. Both parties were represented in these proceedings by counsel until October 2009, when Derek substituted in as a pro per litigant. During the time period relevant to this appeal, Michele had sole physical custody of both children, sole legal custody of Alex, and was requesting sole legal custody of Max. Neither child had regular visitation with Derek.

On September 7, 2011 and November 28, 2011, the trial court issued the two orders now before us on appeal. The November 28, 2011 order requires Derek to pay Michele $30,000 in sanctions to cover a portion of the legal expenses she incurred as a result of his overly aggressive and unnecessary motion filing in these proceedings. Derek filed a notice of appeal from this order on December 9, 2011. The September 7, 2011 order denies Derek's request to modify child support to remove the requirement that he pay an equal share of his children's private school tuition. Derek filed a notice of appeal from this order on October 28, 2011.

DISCUSSION

As previously stated, the following two trial court orders are currently before us: (1) the order granting Michele's motion for $30,000 in sanctions to cover legal expenses she incurred due to Derek's litigation misconduct, and (2) the order denying his motion to modify child support to relieve him of the obligation to pay half of his children's private school tuition. We address each in turn.

I. Order to Impose Sanctions. Appeal No. A133984.

Michele moved for sanctions under Family Code section 271 based upon Derek's persistent and bad faith motion filing from August 2010 to present, a period during which he filed, among other things, several redundant motions regarding visitation and several

versions of an "OSC re Contempt" (which were later withdrawn).[2] In doing so, Michele and her attorney submitted declarations detailing Derek's delaying and obstructive litigation conduct and the substantial legal costs that his conduct had generated.

Following a contested hearing, the trial court granted Michele's motion for sanctions, ordering Derek to pay her $30,000 in attorney's fees and costs, less than half of what she actually incurred during the relevant time period. In its order, the trial court acknowledged Derek had recently filed for bankruptcy, but nonetheless found as follows: "Because of [Derek's] current bankruptcy proceedings, the court cannot determine the extent of [his] current assets and debts. In setting the amount of the sanction order, the court has taken into consideration whether the amount imposes an unreasonable financial burden on [him] and, based on his current income, finds that it does not."[3]

On appeal, Derek argues the trial court's sanction order was an abuse of discretion because there was no evidence supporting its finding that he had the ability to pay the order, or that the order would not impose on him an unreasonable financial hardship. He does not challenge the trial court's finding that the sanction order was justified by his misconduct in these proceedings that had frustrated settlement and needlessly increased legal expenses for Michele. The following legal principles govern.

Section 271, subdivision (a), provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by

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[2] Unless otherwise stated herein, all statutory citations are to the Family Code.

[3] Derek filed for bankruptcy protection in federal court in the Summer of 2011. Before ruling on Michele's motion, the trial court asked the parties for supplemental briefing on whether the pendency of Derek's bankruptcy proceedings precluded the court from imposing sanctions. After considering the parties' briefing, the trial court found sanctions could be imposed against Derek despite his bankruptcy. As Michele points out, Derek does not challenge the trial court's finding on this issue. As such, we presume for purposes of appeal that the trial court's finding was correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [trial court orders are presumed correct in all respects on appeal].)

encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award." (§ 271, subd. (a).)

Thus, based on a clear reading of the statute, " 'section 271 sanctions have been upheld for "obstreperous conduct which frustrated the policy of the law in favor of settlement, and caused the costs of the litigation to greatly increase . . . ." [Citation.]' " (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1082. See also *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1318.) However, "[a] court awarding attorney fees and costs as a sanction under section 271 must consider 'all evidence concerning the parties' incomes, assets, and liabilities' and must not impose an unreasonable financial burden on the sanctioned party. ([§ 271], subd. (a).)" (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 291. See also *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 827-828.)

"We review an award of attorney fees and costs under section 271 for abuse of discretion. [Citation.] 'Accordingly, we will overturn such an order only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order. [Citations.]' [Citation.] We review any factual findings made in connection with the award under the substantial evidence standard. [Citation.]" (*In re Marriage of Fong, supra,* 193 Cal.App.4th at p. 291.) "In reviewing the sanctions order, we indulge all reasonable inferences to uphold it. 'We will not interfere with the order for sanctions unless the trial court abused its broad discretion in making it.' [Citation.]" (*In re Marriage of Falcone & Fyke, supra,* 164 Cal.App.4th at p. 828.)

Having reviewed this record, we conclude the trial court had an adequate basis for finding Derek had the ability to pay sanctions and, thus, that the sanction order would not impose on him an unreasonable financial burden. Specifically, the record reflects that, as required by section 271, the trial court considered all evidence concerning the parties' incomes, assets, and liabilities before ultimately focusing on Derek's salary with bonus of, on average, $9,633 per month before taxes as a suitable basis for its ruling. In doing so, the trial court acted within the wide scope of its discretion.

In reaching this conclusion, we acknowledge Derek's point that he had substantial outstanding debt and other financial obligations (including taxes and child support). However, Derek disregards both his substantial salary as well as Michele's substantial debt, a significant portion of which he caused by his misconduct in frustrating settlement and needlessly increasing the costs of these proceedings. As noted in the trial court's order, Michele incurred $76,292.05 in attorney fees and costs between August 2010 and November 2011 due to Derek's excessive and unreasonable motion filing. The relative wealth of the parties was a proper consideration in determining whether the sanction order would impose an *unreasonable* financial burden. (See *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1226-1227. See also *In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1110 [a party who individually, or by counsel, engages in conduct frustrating or obstructing the public policy is thereby exposed to liability for the adverse party's costs and attorney fees such conduct generates].)

Moreover, while Derek correctly notes the trial court's acknowledgement in the order that it could not determine the exact extent of his current assets and debts due to his bankruptcy proceedings, this does not necessarily mean the trial court was ignorant of Derek's general financial situation. Indeed, both Michele's and Derek's finances have continuously been before the trial court during the course of these lengthy dissolution proceedings, providing the lower court a level of familiarity with this matter that we cannot match on appeal.

Finally, we agree with Michele that the trial court had a reasonable basis for disregarding or, at a minimum, mistrusting Derek's evidence of financial inability based

on certain of his past actions during these proceedings, including his inappropriate commingling and borrowing of funds from a savings account held for the benefit of his son and his unreasonable delay in complying with a court order to turn over funds to Michele's management and control. Again, given the inherent limitations on our understanding of these proceedings, we decline to second-guess the trial court's superior judgment with respect to the parties' credibility. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 494 ["[r]eading a typed reporter's transcript does not enable us to view the witnesses, determine credibility or determine which conflicting evidence is to be given greater weight"].)

Thus, having considered all the evidence in a light most favorable to upholding the trial court's decision, we reject Derek's contention that the sanction order imposed upon him an unreasonable financial burden.[4] Simply put, a reasonable judge could indeed have made the sanction order against Derek based on the evidence at hand, including the evidence of his rather substantial monthly income, his previous inappropriate handling of funds, and Michele's mounting legal debt. We thus affirm.

II. Denial of Request to Modify Child Support. Appeal No. A133579.

We now turn to Derek's contention that the trial court abused its discretion in denying his motion to modify the child support order to remove the requirement that he contribute $10,345 annually to pay his equal share of the children's private school tuition.[5] Specifically, similar to his previous argument, Derek challenges the trial court's

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[4] The parties quibble over whether the trial court was required to make separate findings with respect to Derek's ability to pay (§ 270) and the extent the sanctions order would impose upon him an unreasonable financial burden (§ 271). Derek concedes, however, the evidence required to prove these findings is the same. Given our conclusion that the trial court's order was well supported by the relevant evidence, for purposes of this appeal we need not delve into the legal hair-splitting of whether "ability to pay" and "unreasonable financial burden" are distinct factors.

[5] The stipulated judgment of dissolution included an agreement that the parties would share the cost of private school tuition for academic year 2008-2009. The trial court has continued to enforce this obligation, most recently through the September 7, 2011 order that is the subject of this appeal.

underlying finding that he had the ability to pay the tuition cost. The following legal standards govern.

"Statutory guidelines regulate the determination of child support in California. (See §§ 4050-4203; [citation].) The guideline amount of child support, calculated by applying a mathematical formula to the relative incomes of the parents, is presumptively correct. (See §§ 4055, 4057, subd. (a).) That presumption may be rebutted by 'admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053 . . . .' (§ 4057, subd. (b).)" (*In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, 1359.)

"Section 4053 makes clear that the court's paramount concern in adhering to or departing from the guideline amount must be the interests of the children: '(a) A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life[;] [¶] (b) Both parents are mutually responsible for the support of their children[;] [¶] . . . [¶] (d) Each parent should pay for the support of the children according to his or her ability[;] [¶] (e) The guideline seeks to place the interests of children as the state's top priority[;] [¶] (f) Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children. . . .' " (*In re Marriage of De Guigne, supra,* 97 Cal.App.4th at pp. 1359-1360.)

Of particular relevance to our case, in addition to the child support provided for under section 4053, "[s]ection 4062 provides for discretionary add-ons to account for the specific needs of the children." (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 760-761.) Under section 4062, the trial court is afforded broad discretion to order child support add-ons based upon a family's particular circumstances. (*Ibid*.) These discretionary add-ons may include, for example, payment for children's educational and recreational activities, particularly where needed to "mitigate a decline in the children's standard of living post-dissolution" (*Ibid*.) " 'The amounts in Section 4062, if ordered to be paid, shall be considered additional support for the children and shall be computed in accordance with the following: [¶] (a) If there needs to be an apportionment of expenses

pursuant to Section 4062, the expenses shall be divided one-half to each parent, unless either parent requests a different apportionment pursuant to subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate.' (§ 4061.)" (*Marriage of Schlafly*, *supra*, 149 Cal.App.4th at p. 760.)

In seeking to modify a child support order, a party must demonstrate a change in circumstances justifying the proposed modification. (*In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1015.) On appeal, we review the trial court's decision for abuse of discretion. "We determine 'whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.' [Citation.] We do not substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order. [Citation.]" (*In re Marriage of Schlafly*, *supra*, 149 Cal.App.4th at p. 753.)

Thus, where, as here, a party challenges the trial court's factual findings underlying a child support order, our review is limited to a determination of whether substantial evidence exists in support of such findings. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.) In reviewing the record for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. (*In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 548.) We thus accept all evidence favorable to the prevailing party as true and discard contrary evidence. (*Ibid*; see also *In re Marriage of Drake*, *supra*, 53 Cal.App.4th at p. 1151.)

Here, in challenging the continuation of a child support add-on for private school tuition based on his alleged inability to pay, Derek insists: (1) his "financial situation has changed for the worse" in the last few years as his savings, assets and credit have been depleted (noting, in particular, an outstanding retirement loan now subject to mandatory repayment of $455 per month),[6] (2) the tuition costs for his children have increased significantly in the last two years, and (3) Michele's income has increased substantially

[6] As mentioned above, Derek filed for bankruptcy protection in the Summer of 2011.

since 2010 when she was named partner at the law firm where she is employed. Below, the trial court rejected these contentions as a basis for removing the tuition add-on following an August 30, 2011 contested hearing.

Having reviewed the evidence before us in a light most favorable to Michele as the prevailing party, we conclude the trial court's order must stand. First, it is undisputed that Derek initially agreed to share the cost of the children's private school tuition and never objected when an evaluator later recommended to the court that the parties continue to share this cost based on the children's best interests. In addition, as Derek admits, his monthly salary actually *increased* from $7,917 to $8,875 following entry of the 2009 court order requiring him to continue paying an equal share of the children's private school tuition. Finally, it appears from the September 2011 order, which addresses a variety of issues, that the trial court had some concerns about Derek's credibility during the course of these proceedings, which may have affected the weight afforded his evidence. Not only does the order include a finding that Derek "inappropriately commingled and borrowed funds from savings held for [Alex]," it also imposes terminating sanctions against him with respect to the contempt action he inappropriately filed against Michele. Because the trial court, unlike this court, has had the benefit of personally observing the parties' demeanor and hearing their testimony throughout these lengthy proceedings, we will defer to its superior judgment regarding credibility and the weight of evidence.[7] (*In re Marriage of Smith, supra,* 225 Cal.App.3d at p. 494.)

As set forth above, the statutory scheme reflects the Legislature's intent that, when setting child support, the trial courts have broad discretion to consider many relevant

[7] We note, however, the irony that, in seeking relief from paying the tuition add-on based on his purported depletion of assets, Derek singles out the "expense of this prolonged dissolution and child custody litigation." As discussed above, the trial court has expressly found that Derek has "frustrated the policy of the law to promote settlement of litigation and reduce the cost of litigation" by, among other things, filing a meritless contempt action, filing multiple redundant motions, and taking unreasonable litigation positions in these proceedings. As such, it is not surprising the trial court rejected Derek's high expenses as a basis for modifying his support obligation.

factors, including parental income from salary and other sources, the level of responsibility a parent has for the children, and, most importantly, the interests and standard of living of the children. (*In re Marriage of De Guigne, supra,* 97 Cal.App.4th at pp. 1359-1361; see also *Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1044 ["the court in child support proceedings, to the extent permitted by the child support statutes, must be permitted to exercise the broadest possible discretion in order to achieve equity and fairness in these most sensitive and emotional cases"]; see also ***In re Marriage of Simpson*** (1992) 4 Cal.4th 225, 232 ["the former and current statutory guidelines governing the determination of . . . child support authorize the trial court in its discretion to consider the earning capacity as well as the actual income of the supporting spouse in determining support, but they do not specify or limit the circumstances under which the trial court may look to earning capacity in addition to, or in place of, actual income in fixing support"].) Here, the trial court did just that. Specifically, the trial court considered Derek's overall financial circumstances, including his bankruptcy proceedings and current salary, before concluding he should continue to pay for the private school where the older child, Alex, has been since 2006 and the younger child, Max, has been since 2008. Whether we would have weighed these factors differently is of no moment. "We are not called upon to determine whether we would have made such an award, but whether any judge could reasonably have done so. Based on this record we cannot conclude the order exceeds the bounds of reason. [Citation.]" (*In re Marriage of De Guigne, supra,* 97 Cal.App.4th at p. 1366.)[8]

[8] Michele's request for judicial notice, filed April 4, 2012, is denied as moot.

DISPOSITION

The orders are affirmed. Costs on appeal are awarded to Michele.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.